MOTION FILED

SUPREME COURT, U. S.

MAY 29 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, ET AL., *Petitioners,*

v.

JOSEPH P. MOODY, ET AL., *Respondents.*

PETITIONERS' MOTION FOR LEAVE TO FILE POST-HEARING BRIEF AND APPENDIX AND POST-HEARING BRIEF AND APPENDIX

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MOTION FOR LEAVE TO FILE POST-HEARING BRIEF AND APPENDIX

Petitioner, Albemarle Paper Company, respectfully moves the Court for leave to file the attached post-hearing brief and appendix. In support thereof, Petitioner states as follows:

(1) The purpose of the instant Motion and Brief is to respond only to an erroneous representation made for the first time by the United States and the Equal Employment Opportunity Commission as *amici curiae* in their Brief filed herein on Friday, April 11, 1975, after all other briefs herein nad been filed, that:

> " . . . the *Guidelines* accurately summarize the professionally accepted standards for test validation . . . "

(2) Petitioners did not receive a printed copy of the Government's *amici curiae* brief until Saturday afternoon before the Monday morning oral argument herein. Therefore, at the time of oral argument the contents of the Government's brief were not known to many whose interests in the outcome of

this case are substantial. Counsel for Petitioners responded to the Government's contention in oral argument, but subsequently as the contents of the Government's brief received wider attention the view has been impressed upon Petitioners that the significance of the representation warrants, even at this late hour, its refutation be further documented.

WHEREFORE, Petitioner, Albemarle Paper Company, respectfully moves the Court for leave to file the attached post-hearing brief and appendix.

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Counsel for Petitioners

May 29, 1975

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PETITIONERS' POST-HEARING BRIEF

In their brief *amici curae,* the United States and the Equal Employment Opportunity Commission represented to the Court:

> "In a Title VII case within the scope of EEOC's enforcement jurisdiction, it is particularly appropriate for a court to rely on the professional expertise reflected in the *Guidelines.* And where, as here the pertinent sections of the *Guidelines* accurately summarize the professionally accepted standards for test validation and no showing is made that there are significant differences of opinion within the profession, an employer whose validation study departs from the *Guidelines* should bear the heavy burden of showing that the departure was justified and that the study was nevertheless adequate . . ." (Brief at 15).

Petitioner, Albemarle Paper Company, submits that the documents reproduced in the Appendix hereto clearly demonstrate that the above cited EEOC *Guidelines* (29 C.F.R. §§ 1607.1 *et seq*) do not accurately reflect *the* professionally

accepted standards for test validation and that a significant number of professional psychologists disagree with the *Guidelines* in important respects and in particular as applicable in this case. See Appendix hereto at App. 12-13, 21-23.

Respectfully submitted,

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May 29, 1975

Washington
District of Columbia } **AFFIDAVIT**

My name is Charles Paul Sparks. I am a practicing industrial psychologist employed by Exxon Company, U.S.A. in Houston, Texas as Coordinator of Personnel Research. In that capacity I have responsibility for test and other selection research throughout the Company. I am also an Adjunct Professor of Psychology in the Graduate School of the University of Houston at Houston, Texas. I am a Certified Psychologist by the Texas State Board of Examiners of Psychologists. I am a Fellow of the Division of Industrial and Organizational Psychology of the American Psychological Association and have served as Chairman of the Membership and the Professional Affairs Committees of the Division. I was a member of the Advisory Committee* on Selection and Testing of the Office of Federal Contract Compliance in the U. S. Department of Labor from its inception in 1968 to its discontinuance in 1973. I was a member and serve currently as Chairman of a Project Advisory Committee* on Selection Techniques of the American Petroleum Institute. I am a member of a Technical Subcommittee* of psychologists in an Ad Hoc Industry Group concerned with development of Uniform Guidelines on Employee Selection by the Equal Employment Opportunity Coordinating Council.

I have been asked to comment on a statement which appears in the brief filed for the United States and the Equal Employment Opportunity Commission by the U. S. Department of Justice and the Equal Employment Opportunity Commission in *Albemarle Paper v. Moody*. On page 15 of the brief appears the following:

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* Committee members and their affiliation shown on Attachment A. Each of these members is a respected expert in his field.

> "In a Title VII case within the scope of EEOC's enforcement jurisdiction, it is particularly appropriate for a court to rely upon the professional expertise reflected in the Guidelines. And where, as here, the pertinent sections of the Guidelines accurately summarize the professionally accepted standards for test validation and no showing is made that there are significant differences of opinion within the profession, an employer whose validation study departs from the Guidelines should bear the heavy burden of showing that the departure was justified and that the study was nevertheless adequate to prove that the tests are job-related."

The specific portion I wish to comment on is that which reads, ". . . the Guidelines accurately summarize the professionally accepted standards for test validation and no showing is made that there are significant differences of opinion within the profession. . . . "

The Equal Employment Opportunity Commission issued the subject Guidelines on August 1, 1970 (35 F.R. 12333) including the following introductory material:

> These Guidelines on Employee Selection Procedures supersede and enlarge upon the Guidelines on Employment Testing Procedures, issued by the Equal Employment Opportunity Commission on August 24, 1966. Because the material herein is interpretive in nature, the provisions of the Administrative Procedures Act (5 U.S.C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable. The Guidelines shall be applicable to charges and cases presently pending or hereafter filed with the Commission.

Thus, the profession was given no opportunity to express an opinion as to whether the Guidelines accurately summarized the professionally accepted standards for test validation. Despite this fact, critical comments by members of the profession have been brought to the attention of EEOC in a

number of ways. Four sets of comments, incorporated by reference in this affidavit, are summarized here. Thus I have prepared a comparative analysis* of positions taken on six key issues included in the Guidelines by:

1) Individuals such as myself;
2) Publications such as that of the American Petroleum Institute (A.P.I.) (American Petroleum Institute, *Equal Employment Opportunity: An Interpretive Guide* at 36-52 (1972));
3) Reports such as that submitted by psychologists of an Ad Hoc Industry Group (attached as Exhibit B) see also 2 CCH *Employment Practices Guide* ¶5281 (1974);
4) Articles such as that of Dr. William Mobley in the November-December, 1974 issue of The Personnel Administrator (Mobley, *Meeting Government Guidelines on Testing and Selection,* The Personnel Administrator Nov.-Dec. 1974, p. 42.

I have analyzed the views expressed by the A.P.I., the Ad Hoc Industry Group and Dr. Mobley and the statements attributed to them accurately reflect their views. The A.P.I. publication was issued to assist practitioners in the understanding of the intracies of complying with the EEOC Guidelines and, among other things, points out serious problems.

The report of the psychologists of the Ad Hoc Industry Group was presented on October 23, 1974 to the principals of the Equal Employment Opportunity Coordinating Council to show that their proposed Uniform Guidelines on Employee Selection Techniques perpetuated many of the serious problems embodied in the current EEOC Guidelines. That is, since the proposed Guidelines are similar in significant respects to the current Guidelines, the view of the Ad Hoc

* A comparison of my views with those of A.P.I., the Ad Hoc Industry Group and Dr. Mobley on the six key issues is set forth as Exhibit A to this affidavit.

Group concerning the proposed Guidelines also demonstrates the group's criticism of the current Guidelines. The fact that the EEOCC draft was sent back for further work indicates that the report had some impact.

Dr. Mobley's article is referred to because of its relevance and because Dr. Mobley has not been associated with the writer in any committees or working groups. Dr. Mobley is a psychologist presently employed by the University of South Carolina and with previous industrial research with PPG Industries.

The six issues used to illustrate severe problems associated with the Guidelines are:

Differential Validity
Technical Feasibility
Adverse Effect
Search for Alternatives
Job Analysis
Portability of Validation Studies

The list is not intended to be exhaustive. The six issues are intended as examples to refute the Justice Department and the EEOC position that ". . . the Guidelines accurately summarize the professionally accepted standards for test validation."

/s/ Charles Paul Sparks
Charles Paul Sparks

Subscribed and sworn to before
me this 15th day of May, 1975

/s/ Constance C. Fath
Notary Public

My commission expires: December 14, 1976

ATTACHMENT A

Technical Subcommittee of the Ad Hoc Industry Group-Psychologists

Dr. Paul A. Banas, Ford Motor Co.
Dr. Henry Brenner, First National City Bank
Dr. Patricia J. Dyer, IBM
Mr. Frank Erwin, Richardson, Bellows, Henry & Co.
Mr. Edward J. Karras, Firestone
Ms. Joyce Lawson, General Electric
Dr. Jack A. Parrish, General Motors
Mr. C. Paul Sparks, Exxon
Dr. Mary L. Tenopyr, American Telephone & Telegraph

American Petroleum Institute (A.P.I.) Project Subcommittee on Selection Techniques-Psychologists

Dr. Fred O. Carleton, Standard Oil Company (Ohio)
Mr. Ronald G. Croft, Standard Oil Company of California
Mr. James R. Glennon, Standard Oil Company of Indiana
Dr. Robert F. Morrison, Sun Oil Company
Mr. C. Paul Sparks, Humble Oil & Refining Company (now Exxon)

Advisory Committee on Selection and Testing, Office of Federal Contract Compliance-Psychologists

Dr. Lewis E. Albright, Kaiser Aluminum & Chemical Co.
Dr. Robert D. Dugan, International Telephone & Telegraph
Dr. Robert Guion, Bowling Green University
Dr. Raymond Katzell, New York University
Mr. Howard Lockwood, Lockheed Corporation
Mr. C. Paul Sparks, Humble Oil & Refining Co. (now Exxon)
Dr. Mary L. Tenopyr, U.S. Civil Service Commission
Dr. E. Belvin Williams, Columbia University

EXHIBIT A

DIFFERENTIAL VALIDITY

29 CFR § 1607.4 contains the statement "where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question."

C.P. Sparks' View:

The requirement for differential validity is not based on any significant body of knowledge. As carefully controlled studies with adequate numbers of cases have been performed, the results consistently support the finding that the results predicted for one sub-group are substantially the same as those predicted for other subgroups. In addition, the number of cases required to obtain meaningful results will ordinarily be found only in jobs with low skill or ability requirements, even in the largest installations.

A.P.I. View:

Page 46 of the A.P.I. document says in part: "This paragraph is based on the proposition that it is quite likely that separate validity studies for minority and non-minority groups will often reveal different results for the two groups. Guidelines are given for the action to take when this occurs. Though technically feasible, few employers are likely to be willing to administer a test to one group and not to the other. Community relations are difficult to maintain at best without obvious differential treatment. Further, the few research studies available at this time are in great conflict as to the frequency with which this differential validity may actually exist. It will probably take years for the situation to be resolved."

Ad Hoc Industry View:

Separate validation studies are required for all race, sex, color, national origin and religious groups. This requirement ignores the substantial body of evidence that differences in validity by groups generally do not exist. Moreover, the requirement for multigroup studies, which are complicated and require large numbers of subjects, make compliance with the provision impossible for all employers. The best any employer can hope for is provisional compliance. The multigroup study requirement will have the effect of making employers abandon objective selection procedures.

Mobley View:

The fact that the guidelines devote considerable attention to the need for separate and differential prediction studies indicated that they were written with the belief that differential prediction was a probable hypothesis, i.e., that given test scores would be related to performance in *different and unfair* ways for minority as contrasted with non-minority subgroups.

How viable is this hypothesized need for differential prediction based on racial subgroups? While there has been too little strong research relevant to this point, there would appear to be a growing body of evidence suggesting that differential prediction may not be as prevelant as once thought and that in many cases it does not work to the disadvantage of minorities. (See e.g. Boehm, 1972; Crooks, L.A., 1972; Gael and Grant, 1972; Guinn, Tupes, and Allen, 1970; Ruch, 1972; Grant and Bray, 1971; Bray and Moses, 1972.)

TECHNICAL FEASIBILITY

29 CFR § 1607.4(b) defines "technically feasible" as having a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc.

C.P. Sparks' View:

Technical feasibility is defined as having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance. Research psychologists have typically set this figure at 30, with 50 being a preferred number. However, this number should be composed of *appropriate* individuals, and numbers alone do not define appropriateness. For example, combining 19 long-service minority on-the-job learners with 11 short-service graduates of apprentice training would be completely inappropriate even though 30 minority job incumbents are available. Bias is assumed to be always against the minority incumbent. There is some research to show the opposite, particularly where the company is committed to an affirmative action goal.

A.P.I. View:

"Technically feasible" is first defined as "having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance." This number is not further defined. Research psychologists typically set this figure at 30, creating a requirement that can only be met by the largest companies. Even here, it can only be met in plants where there are large concentrations of employees performing the same or similar jobs. A refinery with fifty operators, fifteen of whom are Negro, cannot perform a "technically feasible" separate study on Negroes, and might be challenged even though the 30 percent Negro proportion might be higher than the Negro proportion in the area from which hiring is normally made. What happens after the employer demonstrates evidence of the absence of technical feasibility is not clear.

Ad Hoc Industry View:

The employer must prove lack of bias in a job performance measure or other criterion in order to conduct a validation

study. There are always performance differences; however, group differences in average job performance are not *prima facie* evidence of bias, but usually reflect genuine differences in job performance. An employer should always attempt to minimize the possibility of any bias in measurement of performance. However, to prove that performance differences are not a result of biased measurement is impossible.

Mobley View:

The term "technically feasible" is used in several passages of the guidelines and is defined as: having or obtaining sufficient sample sizes to achieve findings or statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. What constitutes sufficient sample size and opportunity to collect unbiased criteria are obviously open to interpretation.

ADVERSE EFFECT

29 CFR § 1607.3 refers to "use of any test which adversely affects hiring, promotion, transfer, etc." and 1607.4 includes "Such evidence shall be examined for indications of possible discrimination, such as instances at higher rejection rates for minority candidates than non-minority candidates."

C.P. Sparks' View:

Where adverse effect is defined as hiring minorities in a proportion less than their applicant flow, the results of an employer's Affirmative Action recruiting is likely to be the trigger for application of the guidelines. In such an instance the employer may well hire more than the minority representation in the work force and still be having an adverse effect. In addition numerous consent decrees, affirmative action agreements and court orders have provided that applications will be routinely accepted from minorities even

when no job vacancy exists in order to provide for eventual hiring of such minorities.

A.P.I. View:

No precise statement.

Ad Hoc Industry View:

The definition of adverse impact which "triggers" the need for validation of selection procedures deals with processes rather than results. Regardless of how many members of protected groups are finally selected, the present definition of adverse impact results in the need for validation at every selection procedure step at which a greater proportion of any racial, ethnic or sex group is rejected. Under these conditions, employers, despite their hiring records, will be required to validate almost all of their selection procedures. Moreover, those employers who conduct aggressive affirmative action programs will be particularly affected. As long as the total selection process results in representative numbers of protected groups, with relevant skills, actually hired, the relationship of hires to applicants is irrelevant.

Mobley View:

What does adverse effect mean? One definition is based on a comparison of the percentage of minority applicants who qualify on the particular test in question. This might be called the "qualification rate" definition of adverse effect. If the average score for minorities on certain tests is lower than the average score for non-minorities, the percentage of minorities meeting any given qualifying score generally will be lower than the percentage of non-minorities meeting that qualifying score for these tests.

While qualification rate is a frequently cited basis for evaluating adverse effect, it would seem critical that those responsible for equal employment opportunity, both company

and government compliance investigators, look beyond qualification rate to *hiring* experience.

SEARCH FOR ALTERNATIVES

29 CFR § 1607.3(b) requires the researcher to demonstrate the unavailability of suitable alternative procedures if the test has an adverse effect, even though it had been validated and could be shown to have a high degree of utility. (emphasis added).

C.P. Sparks' View:

The search for alternatives which have less adverse effect presumes that the researcher not only knows of the existence of such alternatives but has access to studies or other evidence which demonstrate their validity. If such evidence were available the alternative would probably be used in the first place. Additionally, no consideration is given to other perameters. If a five-week company paid for training program prior to employment would have less adverse impact than a two-hour test and interview program, would the company be forced to adopt the latter?

A.P.I. View:

Page 40 says in part: "The Order [OFCC's] omits completely any reference to the demonstration of the unavailability of 'alternative suitable . . . procedures.' It is impossible to comply with this EEOC requirement without the availability of a complete taxonomy of *all* potential selection devices, a consensual index of the adverse discrimination generated by each device, and comparative validities for each device. This paragraph has been taken seriously by some EEOC examiners, and some employers have been told that they did not demonstrate the unavailability of suitable alternatives."

Ad Hoc Industry View:

The employer is required to search for alternative methods in the case of adverse impact. The requirements to the extent and the nature of this search are not clear.

Mobley View:

No precise position.

JOB ANALYSIS

29 CFR § 1607.5(b) (c) *includes, "whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses."*

C.P. Sparks' View:

The universal requirement for a job analysis, particularly when a task-type procedure is suggested, is unnecessary and contributes nothing unless the researcher is validating against evaluations of task performance. Approval is given to use of other criteria such as training time, supervisory ratings, regularity of attendance and tenure. Having a detailed job analysis would certainly be meaningless if the criterion was turnover.

A.P.I. View:

The criteria of employee adequacy are to be fully described. This is reasonable since selection procedures may be aimed at accomplishing one or more of several goals and these should be specified. Several alternate criteria to actual work proficiency are suggested as acceptable, and this may be one of the most valuable permissions for the employer. In a job that has a short training period, and near-maximum proficiency can be obtained quickly, turnover may be the most valuable criterion to use, particularly since such a job is very likely to be turnover prone. On the other hand, in a

job that requires a protracted period of training before the incumbent is permitted freedom of action, success in training may be the most valuable criterion.

Ad Hoc Industry View:

The guidelines impose requirements for particular types of job analysis. In addition, job analysis is required when it is unnecessary, such as when an overall criterion of supervisors' ratings is to be used. The guidelines fail to recognize that reviews of job information used in conjunction with a validation study need to be based upon flexible requirements so that they are amenable to situational variables and the validation strategy contemplated. The guidelines should note that a direct assessment of knowledge, skills, and abilities required or a study of work outputs may often be more appropriate than a detailed task analysis. The job analysis requirements specified in the June 24 draft, while an improvement over those previously proposed, still are not adequate in terms of indicating the flexibility which must be permitted.

Mobley View:

No precise statement.

PORTABILITY OF VALIDATION STUDIES

29 CFR § 1607.4(C) (2) provides that evidence obtained in one unit may suffice for others. However, the section concludes, "Provided [*emphasis in original*] *that no significant differences exist between units, jobs, and applicant populations.*"

C.P. Sparks' View:

Organizations are permitted to use validation results obtained at one unit to justify use of the same materials in other units provided that no significant differences exist

between units, jobs, and applicant populations. Differences in education level of the members of a given community is sometimes given as an example of significant differences. However, if the jobs are comparable, the same reading, arithmetic, or other skills will be required in order to perform the job. Thus, the fact that different proportions of a community have a satisfactory level of these skills is irrelevant. Further, even though units might be quite different, the jobs might be quite the same, e.g., keypunch operator.

A.P.I. View:

This paragraph relieves the employer of the necessity of conducting several validation studies for the same job simply because the jobs happen to exist at different locations. A caveat is inserted, "no significant differences exist between units, jobs, and applicant populations." The first of these should create little difficulty in the case of refineries. The second may be more difficult because of organizational differences or different union contracts in the same company. The third may be the most difficult of all to establish, depending in part on the amount of specificity demanded. Different recruiting practices may result in seemingly different applicant populations, even though the areas from which applicants might normally be expected are quite similar in terms of ethnic mix and educational level. Carried to the extreme, it might be easier to perform the validation study than to prove that no significant differences exist among the applicant populations.

Ad Hoc Industry View:

Although the guidelines seemingly encourage cooperative validation efforts among employers, requirements with regard to sample composition and contextual variables make such cooperative efforts impossible. Also the anti-trust implications of cooperative efforts cannot be ignored.

Mobley View:

The guidelines provide that validity findings from one unit of a company or from other companies may be applied to other units, provided that *no significant differences* exist between units, jobs, applicant populations and other contextual variables. What constitutes *significant differences* in units, jobs, applicant populations and contextual variables are open to interpretation.

EXHIBIT B

September 27, 1974
General Criticisms of the June 24, 1974, Draft of
"Uniform Guidelines on Employee
Selection Procedures"

Ad Hoc Industry Group

The Ad Hoc Industry Group has reviewed the June 24, 1974 draft of the EEOCC "Uniform Guidelines on Employee Selection Procedures" and found them to be unworkable, to incorporate controversial and unscientific concepts, and likely to result in the abandonment of rigorous, objective selection procedures by American employers.

It should be understood that criticisms of the Ad Hoc Industry Group are presented in the context of a full endorsement of the aims and purposes of Title VII of the Civil Rights Act of 1964, as amended, and Executive Order 11246, as amended. There is also recognition that guidelines and regulations must be promulgated by the enforcing agencies to ensure uniform interpretation of these broadly drawn documents. In the area of testing, uniform interpretation is particularly required for both those who must comply and those who must enforce, since testing is complex and subject to emotional overtones.

The Ad Hoc Industry Group stands ready to contribute in any way to the development of a set of workable and technically acceptable guidelines whereby all parties will be able to evaluate whether any tests being used are violative of Title VII of the Act or the Executive Order.

The Ad Hoc Industry Group's criticisms of the guidelines were prepared by a technical committee of psychologists with a wide array of experience in business and academia. This committee believes that the interests of the public would best be served by replacing the present draft guidelines with a series of principles supplemented by an adden-

dum of interpretive material. The committee has developed 16 major criticisms of the current draft of the guidelines. Moreover, a detailed analysis of individual guideline sections has been prepared.

The general criticisms and committee recommendations are as follows:

1. The definition of adverse impact which "triggers" the need for validation of selection procedures deals with processes rather than results. Regardless of how many members of protected groups are finally selected, the present definition of adverse impact results in the need for validation at every selection procedure step at which a greater proportion of any racial, ethnic or sex group is rejected. Under these conditions, employers, despite their hiring records, will be required to validate almost all of their selection procedures. Moreover, those employers who conduct aggressive affirmative action programs will be particularly affected. As long as the total selection process results in representative numbers of protected groups, with relevant skills, actually hired, the relationship of hires to applicants is irrelevant.

RECOMMENDATION: Define adverse impact primarily in terms of end results so that there is no adverse impact when:

a. An employer selects from the applicant pool members of groups concerned in proportion to their representation in that pool; or

b. An employer's procedures result in an applicant flow of protected groups in excess of its representation in the relevant labor pool and final selection of such groups is in reasonable proportion to their availability in the relevant labor market; or

c. An employer meets any agreed upon selection goals (approved affirmative action plan, court order, consent decree, etc.) for the job or jobs in question.

2. The employer is required to search for alternative methods in the case of adverse impact. The requirements on the extent and the nature of this search are not clear.

RECOMMENDATION: Delete the requirement to search for alternatives.

3. Both validity and practical usefulness of selection procedures are required. The addition of the term "practical usefulness" goes beyond the mandate of job relatedness. Moreover, the term is subject to many interpretations and has no clear cut definition in the professional literature.

RECOMMENDATION: Eliminate all references to practical usefulness and similar concepts.

4. The actual and *de facto* guideline definitions of ethnic group are in conflict. The broader of these definitions includes all nationality, sex, race, color, and religious groups. Requirements related to treatment of ethnic group appear throughout the guidelines.

RECOMMENDATION: Throughout the guidelines, define racial or ethnic groups in terms of the EEO-1 categories.

5. The term "business necessity" is an important consideration in the determination of the permissibility of using selection procedures, and setting of standards on such procedures. This term is not defined in the guidelines.

RECOMMENDATION: Replace the term "business necessity" with "*bona fide* business, government, or union purpose."

6. When conditions make a typical criterion-related study infeasible, employers are required to validate by some other strategy. Since oftentimes criterion-related studies

are the only appropriate validation strategy, this requirement is confusing and totally impossible for employers to meet. The problem is further confounded by the requirement for separate validation studies for various groups. The guideline requirements can be interpreted to mean that when a criterion-related study is appropriate for the majority group, a content justification for the test must be prepared for every minority group for which a criterion-related study is not technically feasible. The requirement is not only impossible for employers to meet, but also dictates unsound psychological practice.

RECOMMENDATION: Eliminate the universal requirement for validation by some strategy. Also, remove many of the restrictions on the use of validation studies done by others and on cooperative validation, so that employers may use objective selection procedures for jobs having a small number of incumbents.

7. The guideline requirements are far more stringent than those of past orders and guidelines. These new requirements have been made retroactive to apply to past validation efforts which may have been in compliance with guidelines in effect when the work was done. None of these efforts would comply with the proposed guidelines.

RECOMMENDATION: Provided the job has not changed, allow for governmental acceptance of validation studies which were in compliance with guidelines in effect at the time the work was done and acceptance of work predating all guidelines provided that the work was technically adequate.

8. The numerous detailed restrictions on interim use of a selection procedure make it impossible for any employer to use, even provisionally, any selection procedure not in com-

plete compliance with the proposed guidelines. Since no known validation study is in compliance with the draft guidelines, it appears that the employer is allowed no objective selection procedures at all.

RECOMMENDATION: Allow interim use of procedures where the employer has evidence of validation studies done by others, or where validation efforts are underway or will be conducted in a reasonable period of time.

9. Although the guidelines seemingly encourage cooperative validation efforts among employers, requirements with regard to sample composition and contextual variables make such cooperative efforts impossible. Also the anti-trust implications of cooperative efforts cannot be ignored.

RECOMMENDATION: Allow cooperative validation at any time the jobs involved are comparable. Allow the use of others' validation studies when the jobs are comparable and the selection procedure involved has been shown to be valid against a criterion similar to that which the employer wishes to use. Obtain a clear position from the U. S. Department of Justice on the legality of cooperative efforts.

10. An employer who has denied equal employment opportunity to a group in the past must allow that group to compete for jobs under no more stringent selection standards than were in effect at the time the group was denied opportunity. Thus, since it could be argued that most employers have at some time denied opportunity to some group, an employer establishing an improved or more valid selection procedure could be prohibited from using it with certain groups.

RECOMMENDATION: Change the section to indicate clearly that private as well as public employers are allowed

to establish new, valid selection procedures. Replace the first sentence with this language from Griggs: "An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance."

11. A detailed, long range validation plan is required of every employer. This requirement is inconsistent with the provision that the employer need only validate when there is adverse impact. There are many questions about the need for and the proposed use of this plan. For example, what will be the government's action if the employer falls behind schedule relative to his or her own plan? It appears that the plan will be subject to various interpretations and will be challenged by various compliance officers and yet could not be used as a defense. Moreover, the specificity of the other sections of the guidelines obviates a detailed, highly specific plan. Perhaps unintentionally, the provision for such a plan results in an onerous and impractical reporting requirement for the employer.

RECOMMENDATION: Eliminate all references to required validation plans.

12. The employer must prove lack of bias in a job performance measure or other criterion in order to conduct a validation study. There are always performance differences; however, group differences in average job performance are not *prima facie* evidence of bias, but usually reflect genuine differences in job performance. An employer should always attempt to minimize the possibility of any bias in measurement of performance. However, to prove that performance differences are not a result of biased measurement is impossible.

RECOMMENDATION: Eliminate all requirements for

proof of unbiased criteria. However, encourage employers to consider the possibility of bias.

13. Separate validation studies are required for all race, sex, color, national origin and religious groups. This requirement ignores the substantial body of evidence that differences in validity by groups generally do not exist. Moreover, the requirements for multigroup studies, which are complicated and require large numbers of subjects, make compliance with the provision impossible for all employers. The best any employer can hope for is provisional compliance. The multigroup study requirement will have the effect of making employers abandon objective selection procedures.

RECOMMENDATION: Eliminate all requirements for differential prediction studies and for specific sample composition for other validation studies.

14. The absence of a specific identification of those selection procedures which are to be subject to validation research requirements, as compared to those which are not, significantly increases the possibility of misinterpretation by employers and enforcement agency personnel. Validation research requirements should be applied only to quantified methods. Other methods, such as the interview and reference checking, should be justified by a *bona fide* business, union, or government purpose.

RECOMMENDATION: Provide specific listings of those procedures which require validation and those which do not. Specify that non-quantified procedures should be justified on the basis of a *bona fide* business, union, or government purpose.

15. The guidelines impose requirements for particular types of job analysis. In addition, job analysis is required

when it is unnecessary, such as when an overall criterion of supervisors' ratings is to be used. The guidelines fail to recognize that reviews of job information used in conjunction with a validation study need to be based upon flexible requirements so that they are amenable to situational variables and the validation strategy contemplated. The guidelines should note that a direct assessment of knowledges, skills, and abilities required or a study of work outputs may often be more appropriate than a detailed task analysis. The job analysis requirements specified in the June 24 draft, while an improvement over those previously proposed, still are not adequate in terms of indicating the flexibility which must be permitted.

RECOMMENDATION: Allow for various types of review of job information, as required by the particular situation and the validation strategy contemplated.

16. The stipulation that examining for a higher level job will not be appropriate where the individual's progression to that job is not a "highly probable" occurrence sets a standard with which no employer can comply. Terms such as "highly probable" and "probable" are subject to individual interpretation and imply an almost automatic progression for every individual hired. Given differences in performance levels, individual preferences, and even normal turnover, every individual hired will not progress to a higher level position.

RECOMMENDATION: Permit examining for higher level jobs when a majority of those remaining employed progress to those jobs within a reasonable period of time.

In Summary

Taken section by section, subsection by subsection, line by line the proposed Guidelines (6/24/74) build to a set of

requirements and proscriptions which have the practical effect of eliminating objective measurement from the selection process. Given the typical structure and manning of business, industry, and government as it exists today, it is not technically feasible to meet many of the requirements even where the professional know-how exists. It is the interaction of the requirements and proscriptions which is the real deterrent to compliance. These requirements are frequently contradictory. Compliance with one requirement guarantees that another will be violated. Where this is not philosophically true, it is true in the actual world of employment because employers are dealing with real people, not with hypothetical cases for research.

Authors of the proposed Guidelines have indicated that controversial definitions and postulates will eventually be decided by the Federal courts. Employers have no desire to resort to the courts. This is particularly true because their day-to-day conflicts over interpretation of Guidelines such as these are with EEOC investigators and compliance officers of OFCC's compliance agencies. Furthermore, these investigators and compliance officers are generally guided by extensions of the original Guidelines through interpretations, advisories, implementing orders, etc., prepared by their own agencies and not coordinated with the progenitors of the original document.

The entire thrust of the proposed Guidelines is proscriptive, i.e., to prevent employers from discriminating against groups either overtly or inadvertently. Yet by placing so many restrictions on objective selection procedures, the employer is forced to use selection procedures which are not job related and which, in a sense, discriminate against the qualified, regardless of their group membership.